

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of) MM Docket No. 93-17
)
Amendment of Section 73.202(b),) RM-8170
Table of Allotments,)
FM Broadcast Stations,)
(Rosendale, New York))

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To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

OPPOSITION TO PETITION FOR RECONSIDERATION

Aritaur Communications, Inc. ("Aritaur"), by and through counsel, and pursuant to §1.429(f) of the Commission's Rules (47 C.F.R. §1.429(f)), hereby submits its Opposition to the "Petition for Reconsideration" filed by State University of New York ("SUNY") seeking reconsideration of the Commission's Report and Order, 10 FCC Rcd 11461 (1995), ("R&O"), in the above-captioned proceeding.¹ In support whereof, the following is shown:

¹ Pursuant to §1.4(b) and §1.429(f) of the Commission's rules, oppositions to petitions for reconsideration filed in rulemaking proceedings must be filed within fifteen days after the date of public notice of the petition's filing. Section 1.4(b) of the Rules states that notice shall be given by publication in the Federal Register. On December 19, 1995, notice of SUNY's Petition for Reconsideration was given in the Federal Register. See 60 F.R. 65324, released December 19, 1995. This Opposition would have been due fifteen days later on January 3, 1996. However, due to the Federal government shutdown and snow emergency, the Commission was closed and did not re-open until January 11, 1996. On January 11, 1996, the Commission issued a Public Notice, DA 96-2, wherein it stated that all filings due to be filed with the Commission during the shutdown period that ordinarily would have been due the first day the Commission re-opened would now be due January 16, 1996. Therefore, this Opposition is timely filed.

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Standing

1. SUNY is seeking reconsideration of the Commission's decision allotting a new FM station on Channel 273A at Rosendale, New York.² SUNY argues that the Commission erred when it opened a new FM window for Channel 273A at Rosendale and that Channel 273A should have been reserved for use with SUNY's noncommercial FM station, WFNP, Rosendale, New York. The FM window opened on December 4, 1995, and closed on January 4, 1996. On January 4, 1996, Aritaur filed an application for the new FM Channel 273A at Rosendale. If the Commission grants SUNY's Petition, the Commission will rescind its R&O and dismiss Aritaur's pending application. If such action is taken, Aritaur will suffer irreparable, measurable harm. Aritaur is without question a "party in interest" within the meaning of §309(d) of the Communications Act of 1934, as amended, and has standing to oppose SUNY's Petition. See, FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1970).

Background

2. In its Petition for Rulemaking filed in this proceeding, SUNY requested the Commission to allot new FM Channel 273A to Rosendale, New York. WFNP shares Channel 204A with another noncommercial broadcaster, WRHV, Poughkeepsie, New York, through a timesharing arrangement. SUNY requested that the Commission allot Channel 273A at Rosendale and that, pursuant to

² SUNY also filed an "Emergency Request for Stay of FM Application Window." Together with this Opposition, Aritaur is simultaneously filing an Opposition to SUNY's Emergency Request.

§1.420(g) of the Commission's Rules, the license of WFNP be modified to permit operation on Channel 273A. In effect, SUNY requested that the Commission not permit other parties to file for Channel 273A at Rosendale and that SUNY's proposed modification for WFNP be protected from outside expressions of interest.

3. In its Notice of Proposed Rulemaking, 8 FCC Rcd 947 (1993), in this proceeding, the Commission sought a clarification from SUNY as to whether SUNY desired that Channel 273A be designated a noncommercial allotment. This clarification was necessary because Channel 273A was a "nonreserved band" channel and SUNY had not specifically requested that the channel be reserved for noncommercial use. In response to the Commission's inquiry, SUNY stated in its comments that it did not want Channel 273A reserved for noncommercial use. See, R&Q at fn 5.

4. Since SUNY specifically rejected the Commission's offer that Channel 273A be reserved for noncommercial use, the Commission allotted Channel 273A at Rosendale, and did not modify the license of WFNP to operate on Channel 273A pursuant to §1.420(g) of the Rules. Instead, the Commission allotted the new channel and opened an FM filing window. SUNY now seeks reconsideration of the Commission's decision.

The Commission's Decision to Open a Filing Window For Channel 273A at Rosendale, New York, Was Based on Precedent and Should be Affirmed

5. In its R&Q, the Commission found that it could not invoke the provisions of §1.420(g) of the Rules to permit modification of WFNP's license.

The Commission found that, in the Report and Order, 56 RR 2d 1253 (1984), adopting §1.420(g) of the Rules, it had stated that the special modification provision would not apply to stations seeking to switch from a noncommercial band channel to a commercial band channel, finding that such an issue was outside the scope of the proceeding. Since the Commission did not specifically state in the Report and Order that such modifications were permitted, there was no justification to permit SUNY to invoke §1.420(g) in this case.

6. SUNY argues that modification of the license of WFNP for operation on Channel 273A at Rosendale was permissible pursuant to §1.420(g) of the Commission's Rules. SUNY contends that the language of §1.420(g) does not state that reserved band licensees are exempt from seeking to modify their stations' licenses to a nonreserved band channel. SUNY claims that if the Commission meant to exempt such modifications, it should have provided specific language in §1.420(g) to that effect. SUNY ignores that the Commission, in its Report and Order adopting §1.420(g) specifically considered whether to permit such modifications, and found that such an issue was outside the scope of the proceeding. Had the Commission desired that FM licensees be permitted to modify their station's licenses from a reserved band to a nonreserved channel it could have specifically stated its intent in its Report and Order. By finding that issue outside of the scope of the proceeding, the Commission effectively restricted the use of §1.420(g) of the Rules strictly to commercial channel modifications. To

permit the modification proposed by SUNY would therefore be contrary to the Commission's policy.

7. While the Commission permitted a licensee to modify its station license from a reserved band channel to a nonreserved band channel in FM Table of Allotments (Sioux Falls, SD), 51 FR 4169, released February 3, 1986, the Commission noted that its decision in that case was based upon unique circumstances that do not exist here. The decision to permit the licensee in the Sioux Falls, SD case to modify its station's license was made to correct an error on the Commission's part. The Commission had misinterpreted the desire of a noncommercial station, KCFS, to provide Sioux Falls, South Dakota, with two noncommercial services on Channel 215A and Channel 211A. The Commission mistakenly deleted Channel 211A. KCFS had already filed an application for Channel 211A and that application had achieved cut-off protection. To correct its error, the Commission proposed to allot nonreserved band Channel 261A and to modify the license of Station KCFS for operation on Channel 261A. None of the unique circumstances that existed in that case are present here. The Commission is not seeking to remedy a past error and no special action is warranted in this case. SUNY has not shown why it should be afforded special consideration or how the facts of this case are unique and warrant a different result.

8. Furthermore, in the Sioux Falls, SD case, the Commission found that there would be no harm to the public interest by permitting the noncommercial station to modify from a reserved band channel to a nonreserved band since Sioux

Falls would continue to receive service from four noncommercial stations. The Commission was not concerned that its action would result in the removal of the community's sole local noncommercial educational service. In this case, WFNP provides the only local noncommercial service to Rosendale and to permit the modification proposed by SUNY could result in the loss of that community's sole noncommercial educational service since SUNY could assign the license of the station to another entity to be operated on a commercial basis. The Commission properly determined that new FM Channel 273A should be allotted to Rosendale, New York, and that a filing window should be opened. SUNY's Petition for Reconsideration does not address this important issue.

9. SUNY argues that it did not realize that it was required to reserve Channel 273A in order for its proposal to be granted. The Commission permits noncommercial FM stations to modify their license to operate on a commercial channel reserved for noncommercial use only in those cases where it is demonstrated that no reserved band channel is available because of either (a) foreign spacing constraints or (b) potential interference to TV Channel 6 operations. In this case, there was no channel within the reserved FM band for use by WFNP because of domestic spacing constraints and not because of either foreign spacing constraints or TV Channel 6 interference problems. Therefore, even if SUNY had requested that Channel 273A be reserved for use as a noncommercial channel, its proposal would have been denied as contrary to Commission precedent. See, R&Q at ¶2, citing, FM Table of Allotments (Siloam

Springs, Arkansas), 2 FCC Rcd 7485 (1987), aff'd, 4 FCC Rcd 4920 (1989), and FM Table of Allotments (Bulls Gaps, Tennessee), DA 95-1981, released September 22, 1995. Once again, SUNY's Petition for Reconsideration is silent on this important point.

10. Finally, SUNY makes several ephemeral "public interest" arguments that it claims support reconsideration of the Commission's decision in this case. SUNY argues that permitting the modification of the license of WFNP to Channel 273A would "further the goals of the Commission," that it would result in the "upgrade and improvement of service," and that the Commission's action will deprive the public of the benefits of its proposal. Contrary to SUNY's belief, the public will be better served by the allotment of a new FM station at Rosendale. As the Commission recognized, by allotting a new FM station on Channel 273A at Rosendale, the Commission will ensure new FM service at Rosendale while retaining that community's only noncommercial station. See, R&O at ¶3. Such an outcome is superior to SUNY's proposal which could result in the loss of noncommercial service and which would benefit only SUNY's personal interest and not the interests of the general public.

Conclusion

11. SUNY has failed to demonstrate that the Commission erred when it allotted Channel 273A at Rosendale, New York, and opened a filing window for the new allotment. The Commission's action was supported by precedent and will serve the public interest. The Commission correctly found that SUNY's proposal

is contrary to the Commission's intent when it designed §1.420(g) of the Rules. Even if SUNY had requested that Channel 273A at Rosendale be reserved for noncommercial use, the Commission correctly concluded that SUNY's proposal would still have been denied as contrary to Commission precedent. SUNY makes no argument whatever to support reconsideration of the Commission's decision in this proceeding and its Petition for Reconsideration should be denied.

WHEREFORE, the above-premises considered, Aritaur Communications, Inc. respectfully requests that the Petition for Reconsideration filed by State University of New York be **DENIED**.

Respectfully submitted,

ARITAU COMMUNICATIONS, INC.

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January 16, 1996

CERTIFICATE OF SERVICE

I, Denise L. Felice, a secretary in the law firm of Smithwick, & Belendiuk, P.C., certify that on this 16th day of January, 1996, copies of the foregoing were sent by first class mail, postage prepaid, to the following:

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